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12 IN THE UNITED STATES DISTRICT COURT  
13 FOR THE NORTHERN DISTRICT OF CALIFORNIA  
14 OAKLAND DIVISION

16  
17 ELECTRONIC FRONTIER FOUNDATION, ) Case No. 4:09-CV-03351-SBA  
18 Plaintiff, )  
19 vs. )  
20 CENTRAL INTELLIGENCE AGENCY, *et* ) MEMORANDUM IN OPPOSITION TO  
21 *al.*, ) DEFENDANTS' MOTION FOR STAY  
22 Defendants. ) OF PROCEEDINGS WITH RESPECT  
23 ) TO FBI  
24 ) Date: December 1, 2009  
25 ) Time: 1:00 p.m.  
26 ) Courtroom: 1, 4th Floor  
27 )  
28 )

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Case No. 4:09-CV-03351-SBA

MEMORANDUM IN OPPOSITION TO DEFENDANTS'  
MOTION FOR STAY OF PROCEEDINGS WITH RESPECT TO FBI

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## **SUMMARY OF ARGUMENT**

Defendants have moved for a stay, asking the Court to allow the Federal Bureau of Investigation (“FBI”) as long as four and a half years to respond to plaintiff Electronic Frontier Foundation’s (“EFF”) Freedom of Information Act (“FOIA”) requests. However, the government has failed to make the showing required for this Court to grant the requested stay.

The FOIA gives agencies twenty working days to respond to a request for records. Under the statute, a court may grant an agency a stay to allow it to complete processing when an agency demonstrates “exceptional circumstances” exist to justify such relief. A court may find exceptional circumstances and grant a stay only when an agency meets each prong of a three-part test under *Open America v. Watergate Special Prosecution Force*: (1) the volume of requests must be vastly in excess of that anticipated by Congress, (2) the existing resources must be inadequate to deal with the volume of such requests, (3) and the agency must show that it “is exercising due diligence” in processing the requests.

The FBI has failed to satisfy any of the *Open America* prongs. As such, the Court should deny defendants' motion for a four-and-a-half year stay with respect to the FBI and order it to complete the processing of EFF's FOIA requests by December 15, 2009.

1                   **MEMORANDUM OF POINTS AND AUTHORITIES**

2                   **I. INTRODUCTION**

3                   Defendants have moved for entry of an order to stay the processing of Freedom of  
4                   Information Act (“FOIA”) requests submitted by plaintiff Electronic Frontier Foundation (“EFF”)  
5                   on February 25, 2008 and June 19, 2009 to defendant Department of Justice’s component, the  
6                   Federal Bureau of Investigation (“FBI”). The requests seek records related to the FBI’s reports to  
7                   the Intelligence Oversight Board. Defendants do not dispute that EFF’s requests are legally  
8                   entitled to processing under the FOIA and the agency’s regulations. Now, however, more than two  
9                   years after EFF submitted the first request, the FBI not only has failed to complete its processing,  
10                  but asks that it be permitted an additional four and half years to do so.

11                  The FBI has failed to make the showing necessary for the Court to permit it such an  
12                  exceptional amount of time to process EFF’s FOIA requests. Therefore, the Court should deny the  
13                  defendants’ motion, and order the FBI to complete the processing of EFF’s requests by December  
14                  15, 2009. Should the Court grant the FBI a longer period of time to process EFF’s requests, EFF  
15                  respectfully asks that the Court order the FBI to make interim releases of material responsive to  
16                  EFF’s request every four weeks, and submit periodic reports to the Court on the Bureau’s progress  
17                  toward completion of the processing of EFF’s FOIA requests.

18                  **II. STATEMENT OF FACTS**

19                  This case arises from the defendants’ handling of twenty-one FOIA requests submitted by  
20                  plaintiff seeking disclosure of agency records relating to intelligence agencies’ reports to the  
21                  Intelligence Oversight Board (“IOB”), an Executive Branch body that oversees intelligence  
22                  matters. EFF has moved for partial summary judgment on the issue of timing against some of the  
23                  defendants, including the defendant Department of Justice’s component, the FBI.

24                  EFF sent two FOIA requests to the FBI that are at issue in this lawsuit. By letter sent to the  
25                  FBI via facsimile on February 25, 2008, EFF sought disclosure of all reports submitted by the FBI  
26                  to the IOB pursuant to the applicable Executive Order from January 1, 2001 through February 25,  
27                  2008. Plaintiff’s Motion for Partial Summary Judgment (Dkt. No. 13) (“Plaintiff’s MPSJ”) at 3.

1 By letter sent to the FBI via facsimile on June 19, 2009, EFF requested disclosure of records  
 2 maintained by the FBI in connection with the reports submitted to the IOB and the Director of  
 3 National Intelligence pursuant to the applicable Executive Orders from February 25, 2008 through  
 4 June 19, 2009. Plaintiff's MPSJ at 5. The FBI represents that it has completed its searches for  
 5 records responsive to both requests, but has released no documents to EFF. Defendants' Motion  
 6 for a Stay with Respect to FBI (Dkt. No. 26) ("Mot. for Stay") at 8.

7 On September 28, 2009, EFF moved for partial summary judgment against some of the  
 8 defendants in this case, including the Department of Justice. EFF seeks an order requiring  
 9 defendants to complete the processing of EFF's FOIA requests by December 15, 2009. Proposed  
 10 Order Granting Plaintiff's Motion for Partial Summary Judgment (Dkt. No. 13-1). The  
 11 government has now moved for a stay to allow the FBI until May 6, 2014, and May 4, 2013 to  
 12 complete processing of EFF's February 25, 2008 and June 19, 2009 FOIA requests, respectively.  
 13 Mot. for Stay at 8.

### 14 **III. ARGUMENT**

15 EFF is seeking records about the FBI's reports of its own possibly unlawful activities to the  
 16 IOB, the primary oversight body within the Executive Branch. The FBI has failed to comply with  
 17 the FOIA's mandated time limits for the production of documents and now asks the Court to allow  
 18 it until 2014 to complete the processing of EFF's FOIA requests. EFF submitted the first request at  
 19 issue in this case to the FBI more than twenty months ago in February 2008, followed by an  
 20 additional request in June 2009. The FBI's failure to complete the processing of EFF's requests  
 21 promptly frustrates the purposes of the FOIA and cannot be supported by the law. For the reasons  
 22 discussed below, the Court should deny defendants' motion for a stay with respect to the FBI and  
 23 order the Bureau to complete the processing of EFF's requests by December 15, 2009.

#### 24 **A. The FBI Has Failed to Show that it Should Be Permitted More Than Four** **Additional Years to Process EFF's FOIA Requests**

25 The FOIA provides that an agency shall "determine within 20 days . . . after the receipt of  
 26 any such request whether to comply with such request and shall immediately notify the person  
 27 making such request of such determination and the reasons therefor," 5 U.S.C. § 552(a)(6)(A)(i).

1 The statute further provides that “[u]pon any determination by an agency to comply with a request  
 2 for records, the records shall be made *promptly* available to such person making such request.” *Id.*  
 3 at § 552(a)(6)(C)(i) (emphasis added), *see also Judicial Watch, Inc. v. Dep’t of Homeland Sec.*, 514  
 4 F. Supp. 2d 7, 8 (D.D.C. 2007) (“defendant agencies were required to respond within twenty days  
 5 to this FOIA request, [however] no responsive records were produced”). To allow the FBI more  
 6 than four years to complete processing EFF’s requests would render meaningless the FOIA’s  
 7 requirement that “records shall be made *promptly* available.” *See id.*

8 While the FOIA does provide a safety valve to allow courts to grant agencies additional  
 9 time in non-routine cases, the FBI has not made a showing sufficient to avail itself of that relief.  
 10 Only when “the Government can show exceptional circumstances exist and that the agency is  
 11 exercising due diligence in responding to the request,” may a court stay an action and allow the  
 12 agency additional time to complete processing. 5 U.S.C. § 552(a)(6)(C)(i) (the “exceptional  
 13 circumstances-due diligence” standard). However, the government has failed to show that  
 14 exceptional circumstances exist in this case to justify the stay that it seeks.

15 Nearly two years after EFF’s February 2008 requests, defendants now ask that the FBI be  
 16 allowed more than four additional years to complete a task for which the law allows twenty  
 17 working days. *See Fiduccia v. Dept. of Justice*, 185 F.3d 1035, 1041 (9th Cir. 1999) (“Congress  
 18 gave agencies 20 *days*, not years, to decide whether to comply with requests and notify the  
 19 requesters, and authorized agencies to give themselves extensions for 10 *days* for ‘unusual  
 20 circumstances.’”) (emphasis in original). The time limits of the FOIA are short; indeed, the Ninth  
 21 Circuit has emphasized that “Congress wrote a tough statute on agency delay in FOIA  
 22 compliance.” *Id.*

23       1.       The FBI Has Failed to Demonstrate that Exceptional Circumstances Exist to  
 24               Justify a Stay

25       “The FBI acknowledges that it is asking the court for a lengthy stay” of proceedings in  
 26 which to process EFF’s requests, Mot. for Stay at 1, and maintains that it is entitled to more than  
 27 four additional years pursuant to the FOIA and applicable case law. The legal standard the FBI  
 28 must satisfy to demonstrate an entitlement to a stay is well established. The “exceptional

1       “circumstances-due diligence” standard derives from two sources: the FOIA itself, 5 U.S.C.  
 2       § 552(a)(6)(C)(i)-(iii), and the leading case defining these “exceptional circumstances,” *Open*  
 3       *America v. Watergate Special Prosecution Force*, 547 F.2d 605 (D.C. Cir. 1976) (adopted by the  
 4       Ninth Circuit in *Exner v. Federal Bureau of Investigation*, 542 F.2d 1121 (9th Cir. 1976)). As the  
 5       court held in *Open America*, “exceptional circumstances” exist only when the agency satisfies each  
 6       element of a three-part test: “when an agency . . . is deluged with a volume of requests for  
 7       information vastly in excess of that anticipated by Congress, when the existing resources are  
 8       inadequate to deal with the volume of such requests within the time limits of subsection (6)(A), and  
 9       when the agency can show that it ‘is exercising due diligence’ in processing the requests.” *Open*  
 10      *America*, 547 F.2d at 616; *see also Gilmore v. Dep’t of Energy*, 4 F. Supp. 2d 912, 925 (N.D. Cal.  
 11      1998); *Exner*, 542 F.2d at 1122. The FOIA explicitly provides that “the term ‘exceptional  
 12      circumstances’ does not include a delay that results from a predictable agency workload of requests  
 13      under this section, unless the agency demonstrates reasonable progress in reducing its backlog of  
 14      pending requests.” 5 U.S.C. § 552(a)(6)(C)(ii). The FBI clearly cannot meet that standard here.

15           In support of its motion, the Bureau has submitted the declaration of David M. Hardy,  
 16       Section Chief of the Record/Information Dissemination Section, Records Management Division of  
 17       the FBI (“Hardy Decl.”) (Dkt. No. 26-1). The FBI claims that four circumstances prevent it from  
 18       processing EFF’s FOIA requests within the strict time limit prescribed by the law: the volume of  
 19       FOIA requests received, a recent change in the agency’s FOIA policy, the 2006 relocation of the  
 20       FBI’s records unit, and the load of pending litigation and administrative appeals. Hardy Decl. at ¶¶  
 21       25-42. These factors do not constitute “exceptional circumstances.”

22           First, the FBI points to its historical backlog and an increase in FOIA requests that occurred  
 23       during 2006 as reasons why it is overwhelmed and unable to comply with the timing requirements  
 24       of the FOIA. Hardy Decl. at ¶¶ 25-27. However, the FBI makes no argument that this increase is  
 25       “vastly in excess of that anticipated by Congress.” *Open America*, 547 F.2d at 616. The FBI’s  
 26       argument that the a 2006 increase in FOIA requests allows it to satisfy the first prong of *Open*  
 27       *America* is undermined by the fact that Congress last amended the FOIA after the increase cited by

1 the FBI in this case. The OPEN Government Act of 2007, Pub. L. No. 110-175, 121 Stat. 2524  
 2 (2007).) In fact, the FBI's argument on this point is neither new nor specific to the requests at  
 3 issue in this case. *See Elec. Frontier Found. v. Dep't of Justice*, 517 F. Supp. 2d 111, 115 (D.D.C.  
 4 2007) ("DOJ specifically claims that it is prevented from processing EFF's request more quickly  
 5 because the FBI experienced a significant increase in FOIA requests in 2006." (citing a prior  
 6 declaration of Mr. Hardy)). While the court in *Electronic Frontier Foundation* found in 2007 that  
 7 an increase in FOIA requests in 2006 weighed in favor of finding exceptional circumstances, that  
 8 three-year-old increase is now clearly the rule rather than the exception. Because it has not shown  
 9 that its backlog is unanticipated, the FBI has not met its burden under the first prong of *Open  
 10 America*.

11 Next, the FBI asserts a 2009 change in Department of Justice FOIA policy has contributed  
 12 to the Bureau's delay. Hardy Decl. at ¶ 28. This argument goes to the second prong of the *Open  
 13 America* test, that existing resources are inadequate. In response to guidelines issued by the  
 14 Attorney General on March 19, 2009, the FBI now performs searches in response to FOIA requests  
 15 in the office most likely to actually contain the requested records, which the FBI contends has  
 16 significantly increased FOIA processing times. *Id.* On his first full day in office, President Obama  
 17 issued a Memorandum for Heads of Executive Departments and Agencies, 74 Fed. Reg. 4683 (Jan.  
 18 21, 2009). The memorandum provides that "[a]ll agencies should adopt a presumption in favor of  
 19 disclosure, in order to renew their commitment to the principles embodied in FOIA, and to usher in  
 20 a new era of open Government. The presumption of disclosure should be applied to all decisions  
 21 involving FOIA." *Id.* The guidelines cited by the government were promulgated as part of this  
 22 renewed commitment. Remarkably, the FBI now argues in essence that the Obama  
 23 Administration's new policy of openness and transparency requires that the agency take four and a  
 24 half additional years to respond to EFF's FOIA requests. In any event, the FBI concedes that it has  
 25 completed the search for records responsive to EFF's requests. Hardy Decl. at ¶ 18. The Bureau  
 26 offers no reason why review and release of responsive records should be delayed so substantially  
 27 by this new open government policy.

1       Third, the FBI argues that a 2006 move of the Record/Information Dissemination Section  
 2 (“RIDS”) from the District of Columbia to Frederick County, Virginia is contributing to the  
 3 exceptional circumstances justifying the tardiness of its response. Hardy Decl. at ¶ 33-34. This  
 4 argument also goes to the second prong of the *Open America* test. The FBI has been making this  
 5 argument to justify stays in FOIA cases for almost three years. *See Elec. Frontier Found.*, 517 F.  
 6 Supp. 2d at 119 (“Mr. Hardy’s [February 9, 2007] Declaration establishes that this increase has  
 7 been coupled with a significant and unexpected decrease in the staff available to process those  
 8 requests, as a result of the relocation of certain RIDS sections to interim locations in Frederick  
 9 County, Virginia.”). Unless the circumstances contributing to a backlog are *unanticipated*, an  
 10 agency is not entitled to an *Open America* stay, even when it confronts a staffing crisis in the face  
 11 of a heavy litigation caseload and a backlog of pending requests. *See Leadership Conference on*  
 12 *Civil Rights v. Gonzales*, 404 F. Supp. 2d 246, 259 (D.D.C. 2005) (“[T]he Court will not get  
 13 involved in defendants’ personnel and project management difficulties. Therefore, defendants have  
 14 shown the existence of a *predictable* backlog of FOIA request”) (emphasis added). Circumstances  
 15 that may have justified a stay three years ago when they first occurred cannot do so indefinitely  
 16 without reading the word “exceptional” out of the FOIA. Indeed, by making the same argument  
 17 repeatedly over time, the FBI has shown that these circumstances have become routine and can no  
 18 longer support a request for an *Open America* stay.

19       Finally, the FBI claims that its FOIA litigation caseload and a high volume of  
 20 administrative appeals contribute to the extraordinary circumstances that justify its request for a  
 21 four-and-a-half year stay. Hardy Decl. at ¶¶ 35-42. However, routine demands of litigation are not  
 22 “exceptional circumstances” under *Open America*. *Government Accountability Project v.*  
 23 *Department of Health and Human Services*, 568 F. Supp. 2d 55, 61-62 (D.D.C. 2008) (holding that  
 24 defendant agencies failed to show that litigation and congressional requests for documents  
 25 constituted extraordinary circumstances rather than predictable agency workload). Of the five  
 26 ongoing actions cited by the FBI as contributing to its litigation caseload, one will be complete  
 27 before the Court hears argument on this motion and one is currently inactive. Hardy Decl. at ¶¶ 35-

1       40. Furthermore, the FBI has made no attempt to show that the remaining litigation or  
 2 administrative appeals are anything but routine. Defendants have not even claimed that the cited  
 3 workload represents an increase. Without such a showing, the FBI cannot carry its burden to show  
 4 “exceptional circumstances.” *See Elec. Frontier Found.*, 517 F. Supp. 2d at 118 (“DOJ also  
 5 acknowledges, however, that ‘this number does not represent an increase.’ DOJ therefore has not  
 6 shown that the number of administrative appeals facing the FBI is anything other than a predictable  
 7 and regular contributor to its backlog of FOIA requests.”) (internal citations omitted).

8           Therefore, regardless of how difficult or time-consuming the processing of EFF’s FOIA  
 9 requests may be when facing a large FOIA request backlog, litigation deadlines and personnel  
 10 difficulties, the FBI has failed to demonstrate “exceptional circumstances” of the kind that are  
 11 sufficient to satisfy the first two prongs of the well-established *Open America* standard.

12           2.       The FBI Has Not Exercised “Due Diligence” in its Processing of EFF’s  
 13           FOIA Requests

14           The FBI has also failed to satisfy the third, “due diligence” prong of the *Open America*  
 15 standard. Courts have recognized that the FOIA’s legislative history requires an agency to have  
 16 exercised “due diligence” from the outset in order to qualify for the kind of relief the FBI seeks  
 17 here. *Oglesby v. Dep’t of the Army*, 920 F.2d 57, 62 n.3 (D.C. Cir. 1990) (“The court [has]  
 18 authority to allow the agency additional time to examine requested records in exceptional  
 19 circumstances where the agency was exercising due diligence in responding to the request and had  
 20 been since the request was received.”) (quoting H.R. Conf. Rep. No. 1380, 93d Cong., 2d Sess. 11  
 21 (1974)) (emphasis added). The record clearly establishes that the FBI has not even approached the  
 22 requisite showing in its handling of plaintiff’s request to date. EFF’s first request was submitted to  
 23 the FBI on February 25, 2008. Since then, the FBI has located more than 81,000 “potentially  
 24 responsive documents,” Hardy Decl. ¶ 18, but does not plan to begin reviewing the documents until  
 25 2011. Hardy Decl. ¶¶ 19-20.

26           As an initial matter, counsel’s prior dealings with the FBI in FOIA matters have  
 27 consistently shown that an uncertain estimate of “potentially responsive” pages is likely to change  
 28 drastically once responsive material is actually reviewed. For example, in *Electronic Privacy*

1       *Information Center v. Department of Justice*, Civ. No. 05-845, 2005 U.S. Dist. LEXIS 40318  
 2 (D.D.C. Nov. 16, 2006) (attached hereto as Exhibit 1), the FBI initially estimated that 130,000  
 3 pages of document were potentially responsive to the plaintiff's request for records concerning the  
 4 renewal of the USA PATRIOT Act. Hardy Decl. ¶ 20 (filed June 29, 2005) (attached hereto as  
 5 Exhibit 2). The estimate was uncertain because in that case the FBI had not yet located or  
 6 reviewed all potentially responsive documents to determine whether they were in fact responsive to  
 7 the plaintiff's request. *Id.* Ultimately, the FBI determined that only 18,000 pages actually fell  
 8 within the scope of the plaintiff's request — just 14% of the originally estimated universe of  
 9 documents. Def.'s Response to Pl.'s Notice of Filing at 1 (filed Nov. 14, 2005) (attached hereto as  
 10 Exhibit 3). Similarly, in another case captioned *Electronic Frontier Foundation v. Department of*  
 11 *Justice*, 878 of the initial estimate of 72,000 pages of "potentially responsive pages" were found by  
 12 the FBI to be responsive to EFF's FOIA request in that case. 563 F. Supp. 2d 188, 196 (D.D.C.  
 13 2008); Fifth Declaration of David M. Hardy ¶ 5 (attached hereto as Exhibit 4). Finally, *Electronic*  
 14 *Frontier Foundation*, 517 F. Supp. 2d 111, the FBI originally estimated that there were 20,000  
 15 pages "potentially responsive" to EFF's FOIA request when in fact there were only 7,935  
 16 responsive pages. Declaration of David M. Hardy ¶ 38 (attached hereto as Exhibit 5); Fifth  
 17 Declaration of David M. Hardy ¶ 7 (attached hereto as Exhibit 6). Thus, past litigation suggests  
 18 that the FBI's claimed number of "potentially responsive pages" is likely to be a significant  
 19 overestimate of the volume of material the FBI actually processes in this case.

20       Furthermore, the FBI readily admits that the median processing time for its backlog of  
 21 "large queue requests" has in fact increased by 22% since 2006. Hardy Decl. ¶ 27. Such an  
 22 increase cannot excuse "a delay that results from a predictable agency workload of requests  
 23 [without] demonstrat[ing] reasonable progress in reducing its backlog of pending requests." 5  
 24 U.S.C. § 552(a)(6)(C)(ii). It is thus clear that the FBI has, to date, failed to exercise "due  
 25 diligence" in its handling of material responsive to these FOIA requests. By no stretch of the  
 26 imagination can the FBI's response be deemed diligent "since the request was received," *Oglesby*,  
 27 920 F.2d at 62 n.3, where it has taken more than twenty months to merely collect documents that

1       may be responsive to EFF’s requests. Notwithstanding any representations that might be made in  
 2       the government’s submissions, it is beyond dispute that the FBI has failed to meet its burden of  
 3       satisfying the “exceptional circumstances-due diligence” test. Thus, because the FBI has failed to  
 4       satisfy even a single prong of the three-part *Open America* standard, the Court should not permit  
 5       the Bureau an additional four years to process EFF’s requests, but should order the FBI to process  
 6       and release non-exempt material responsive to EFF’s request by December 15, 2009.

7           **B.       The FBI is Not Entitled to Additional Time to Complete Processing**

8       Because the FBI has failed to make the requisite showing under the *Open America*  
 9       standard, the Court should decline to grant the Bureau a stay and order the agency to promptly  
 10      complete processing EFF’s FOIA requests. The rights provided by the FOIA are highly time-  
 11      sensitive. Congress recognized that “excessive delay by the agency in its response is often  
 12      tantamount to denial.” H.R. Rep. No. 93-876, at 4 (1974), *as reprinted in* 1974 U.S.C.C.A.N.  
 13      6267, 6271. Because “stale information is of little value,” EFF’s rights are diminished each day  
 14      the Bureau continues to delay its compliance with the law. *See Payne Enters., Inc. v. U.S.*, 837  
 15      F.2d 486, 494 (D.C. Cir. 1988). Furthermore, the importance to EFF and the public of promptly  
 16      obtaining the documents that are the subject of EFF’s FOIA requests was highlighted just last  
 17      month by President Obama when he signed an order amending Executive Order 13462 which  
 18      governs the Intelligence Oversight Board. Executive Order to Amend Executive Order 13462  
 19      (Oct. 29, 2009) (*available at* <http://www.whitehouse.gov/the-press-office/president-obama-signs-executive-order-amend-executive-order-13462>). That order considerably strengthens the role of  
 20      the IOB. Bringing the documents describing the recent activities of the IOB to light now will  
 21      contribute significantly to the ongoing public discourse surrounding President Obama’s October  
 22      29, 2009 Executive Order.

24       The approach that EFF suggests is not unusual. Courts regularly impose specific  
 25      processing deadlines on agencies, requiring the prompt delivery of non-exempt records to FOIA  
 26      requesters. For example, in *Judicial Watch, Inc. v. Department of Energy*, 191 F. Supp. 2d 138  
 27      (D.D.C. 2002) the court ordered the Commerce Department and the Transportation Department to

1 process, respectively, 9,000 and 6,000 pages of material; to complete the processing within sixty  
 2 days; and to provide the requester with a *Vaughn* index within seventy-two days. *Id.* at 141.

3 Similarly, in *Natural Resources Defense Council v. Department of Energy*, the court  
 4 ordered the Energy Department to process 7,500 pages of material; to complete the processing of  
 5 the “vast majority” of the material within thirty-two days; to complete all processing within forty-  
 6 eight days; and to provide the requester with a *Vaughn* index within sixty-three days. 191 F. Supp.  
 7 2d 41, 43-44 (D.D.C. 2002). In *Electronic Frontier Foundation v. Department of Justice*, the FBI  
 8 sought a twenty-seven month stay to process 20,000 pages potentially responsive to EFF’s FOIA  
 9 request. 517 F. Supp. 2d at 113. The court, despite finding that “exceptional circumstances” in  
 10 fact existed, ordered the FBI to complete processing of EFF’s non-expedited FOIA request within a  
 11 year and to make interim releases of documents every four weeks until then. *Id.* at 121.

12 Finally, in *Government Accountability Project*, the court denied the defendant’s request for  
 13 a stay under *Open America*, ordered the agency to process the plaintiff’s request and begin rolling  
 14 releases of documents within one month. 568 F. Supp. 2d at 56. The defendant had moved for a  
 15 stay of over a year in order to complete processing. In denying the government’s motion for a stay  
 16 and granting judgment on the pleadings on the issue of timing for the plaintiff, Judge Kollar-  
 17 Kotelly held that the twenty-working-day limit of the FOIA sets the time for the production of  
 18 “documents responsive to [the] FOIA request.” *Id.* at 58.

1       **IV. CONCLUSION**

2                  For the foregoing reasons, the Court should deny defendants' motion for entry of an *Open*  
 3 *America* stay, and require the FBI to process EFF's FOIA requests by December 15, 2009. Should  
 4 the Court grant the Bureau a longer period of time to process EFF's requests, plaintiff respectfully  
 5 asks that the Court order the FBI to make interim releases of documents responsive to EFF's  
 6 request every four weeks, and submit periodic reports to the Court on the FBI's progress toward  
 7 completing the processing of EFF's FOIA request.

8                  Dated this 10th day of November, 2009.

Respectfully submitted,

9                  /s/ Nathan D. Cardozo

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